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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD WAYNE HUGHLEY, Defendant and Appellant.	B212995 (Los Angeles County Super. Ct. No. MA035681)
In re RICHARD WAYNE HUGHLEY on Habeas Corpus.	B215423

APPEAL from a judgment of the Superior Court of Los Angeles County. John Murphy, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed with directions.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Petition denied.

James Koester for Defendant, Appellant, and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, and Michael A. Katz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Richard Wayne Hughley appeals from the judgment entered following a jury trial in which he was convicted of first degree burglary and attempted willful, deliberate, and premeditated murder, with great bodily injury, firearm-use and firearm-discharge findings. Defendant contends the trial court erred by refusing to suspend proceedings for a determination of his competency based upon defense counsel's declaration of a doubt that he was competent. He further contends that the court violated his right to due process by requiring him to wear a restraining "stealth belt" during trial. We affirm the judgment and deny defendant's petition for a writ of habeas corpus.

BACKGROUND

In the early morning hours of June 18, 2006, defendant repeatedly punched Gregory Cudjo inside a motor home. Defendant left the motor home on the order of his half brother, but when Cudjo later stepped outside, defendant again punched him and put him in a chokehold. Defendant's half brother again intervened, and defendant left. About 90 minutes later, defendant returned, "smashed" open the door of the motor home, and fired numerous shots at Cudjo, including two shots into Cudjo's back after he fell face down on the floor. Cudjo sustained 10 gunshot wounds.

The jury convicted defendant of attempted murder and found that the attempted murder was willful, deliberate, and premeditated (count 1). The jury further found that in committing the attempted murder defendant personally discharged a firearm, causing great bodily injury. (Pen. Code, § 12022.53, subds. (b)–(d); all further statutory references pertain to the Penal Code.) The jury also convicted defendant of first degree burglary and found that in committing the burglary defendant personally used a firearm and personally inflicted great bodily injury (count 2). (§§ 12022.5, subd. (a), 12022.7, subd. (a).) The trial court found defendant had suffered three prior serious felony convictions and served two prior prison terms. The court sentenced defendant to a "third strike" term of 60 years to life on count 1. The court stayed the sentence on count 2.

DISCUSSION

1. Determination of defendant's competency

After the court took its afternoon break on the third day of jury selection, which was a Friday, defendant refused to return to the courtroom but promised to "come out" on Monday. Defense counsel consented to the court's proposal to continue with voir dire in defendant's absence but informed the court that defendant was "not cooperating." Counsel said she did not think his conduct was voluntary and believed "there's some competency issues there. His behavior has become a little more erratic as the days go by, and at this point I did want to declare a doubt as to his competency." But counsel asked the court "to visit" the issue on Monday. The prosecutor noted that defendant appeared to be assisting in his defense and aware of how he appeared to the jurors because he said he wanted to stand when the jurors entered the courtroom. A little later, the court asked defense counsel if there had been any prior indication of defendant's "mental impairment." Counsel said there had been but cited the attorney-client privilege as the basis for her refusal to provide any specific information. The court stated it would revisit the issue on Monday.

On Monday morning defense counsel apparently informed the court off the record that defendant no longer agreed to wear the stealth belt.

When proceedings resumed on the record on Monday afternoon, defense counsel again declared a doubt about defendant's competency. The trial court informed counsel that it had met with defendant in a conference room that morning: "Mr. Hughley greeted me appropriately and immediately told me that he wanted you [the prosecutor] and [defense counsel] to do a couple of things for him regarding the trial, and once those things have been accomplished, he intended to sit back and, as he put it, let you do your thing." The court told counsel that defendant explained "that he wanted to stand unrestrained when jurors came into the . . . room. I told him that that would be a security concern," but the court would prohibit both attorneys from standing when the jury entered the room so that defendant would not feel uncomfortable. The court further told counsel

that it broached the subject of the stealth belt that defendant had previously agreed to wear during the trial and told defendant that "the choice was his. He had agreed but if he didn't want to do that, that I wouldn't force him to because I have no reason to suspect any behavior from him that would require me to order that he be belted." But the court explained to defendant that if he did not wear the stealth belt, the court would order additional security personnel "because of the nature of the charge itself or the allegation of extreme violence and the fact that" defendant was much larger that the court's female bailiff. The court told counsel that defendant understood and after further "conversation about that," defendant agreed to continue wearing the stealth belt in lieu of having additional security personnel in the courtroom.

The trial court summarized its observations: "Clearly, to me, Mr. Hughley is completely oriented. He said nothing that led me to believe that fairness requires me to order a competency hearing and discharge the potential jurors at this point. [¶] When in the courtroom during jury selection, he appears to me to be alert. I observed him with you, [defense counsel], glancing at the potential jurors, then glancing down at counsel's jury placement chart. I see him conversing with you. Obviously, I don't know what those conversations are about. He seems fully engaged in this process and he has neither done nor said anything the least bit inappropriate."

Defense counsel objected to the trial court's ex parte contact with defendant and insisted that her declaration of doubt about defendant's competency required the trial court to suspend the trial for a determination of his competency. The trial court informed counsel that she was mistaken and proceeded with the trial.

The next day, defense counsel moved for a mistrial on the basis of the trial court's ex parte contact with defendant. The court defended its actions:

"You, [defense counsel], had stated last week . . . that you declared a doubt and you were asking that these proceedings be suspended and the court order a competency hearing.

"You further stated that you could give me no information because to give me any additional information, based on your observations or conversations with Mr. Hughley, you would be violating the attorney-client privilege. At that point, I could have summarily denied your request to suspend these proceedings because there would be no evidence, no substantial evidence, before the court of any incompetency.

"Rather than dealing with the issues summarily in that manner, I decided to take it upon myself, and I believe I have an obligation, if not a duty, to look into the issue that you raised and, to that end, had Mr. Hughley brought into the attorney conference room. I went in there with him. I engaged him in an innocuous conversation: how are you today? He responded appropriately. I was persuaded, just having spent a minute with him, that he was oriented as to time and space and now what was happening with regard to this case.

"I then said to him — he raised the issue of the stealth belt, and I said, you can agree to the stealth belt or not. And that was the end of the conversation.

"So I believe that I have a right, based on the issue you raised, to make a determination on my own of whether or not there is any substantial evidence of incompetency, and I determined that there was not."

Defendant contends that the trial court erred by failing to suspend proceedings and conduct an inquiry under section 1368 et seq. when defense counsel declared a doubt about defendant's competency. He further contends the trial court "constructively held a competency hearing" during its ex parte visit with defendant and thereby deprived him of the effective assistance of counsel at a critical stage in the proceedings.

A defendant who, as the result of mental disorder or developmental disability, "is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner" is incompetent to stand trial. (§ 1367, subd. (a).) When the defendant presents substantial evidence that raises a reasonable doubt about the defendant's competence to stand trial, due process requires that the trial court conduct a full competency hearing. (*People v. Davis* (1995) 10 Cal.4th 463, 527.)

But more is required than simply bizarre actions or statements by the defendant or statements by defense counsel that the defendant is incapable of cooperating in his or her defense. (*People v. Laudermilk* (1967) 67 Cal.2d 272, 285.) When the evidence is less than substantial, the decision to hold a competency hearing is discretionary. (*People v. Pennington* (1967) 66 Cal.2d 508, 518.) "Whether to order a present sanity hearing is for the discretion of the trial judge, and only where a doubt as to sanity may be said to appear as a matter of law or where there is an abuse of discretion may the trial judge's determination be disturbed on appeal." (*Ibid.*)

Before the court engaged in its Monday morning ex parte contact with defendant, the matters purporting to give rise to a reasonable doubt about defendant's competence were defendant's refusal to enter the courtroom for part of one afternoon during jury selection, the report that he had changed his mind about wearing the stealth belt, and conclusory statements by defense counsel that defendant was "not cooperating" and was exhibiting "erratic" behavior. Considered separately or collectively, these matters were not sufficient to raise a reasonable doubt about defendant's competency. The trial court noted that on Friday it had not seen defendant do or say "anything the least bit inappropriate" and that defendant appeared to be "fully engaged in" and attempting to assist counsel with the jury selection process. The court did not abuse its discretion by refusing to conduct a competency hearing.

The trial court erred on Monday by conducting an ex parte inquiry into defendant's competency. Notwithstanding that, according to the trial court, its ex parte contact with defendant lasted about one minute and was "innocuous," the contact infringed on defendant's right to counsel and his privilege against self-incrimination. The court exacerbated the perilous nature of its conduct by failing to conduct its interaction with

defendant on the record. And the contact violated canon 3B(7)[1] of the California Code of Judicial Ethics and created the appearance of impropriety in violation of canon 2.[2]

But the only prejudice defendant has asserted pertains to the evaluation of his competency. In that regard, it is clear no prejudice resulted from the ex parte contact. The record reveals that the trial court had no reason to doubt defendant's competency before the ex parte contact, and nothing that occurred during the ex parte contact altered the court's assessment of defendant's competency. Accordingly, although the trial court egregiously erred, violated its ethical obligations, and improperly insulated the ex parte contact from review, we find no basis for reversal.

2. Use of physical restraints at trial

Just before prospective jurors arrived for the start of voir dire, the trial court stated, "I had thought that given the nature of the charges in this case that we would have security in the courtroom, probably four deputy sheriffs. But that in itself can sometimes create in the minds of the jurors that the defendant is potentially a dangerous person. [¶] For that reason, Mr. Hughley has agreed to wear the stealth belt, and we will not have any more than two deputies in the courtroom at any time." The court asked defendant if he was "comfortable enough" wearing the belt, and he said he was. (The trial court made no mention on the record of defendant's "extremely disruptive" behavior in lock-up approximately 18 months earlier, when a different judge was handling the case.)

Three court days later, outside the presence of defendant and the jury, the trial court noted that defense counsel had informed the court that defendant no longer agreed

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[1] Canon 3B(7) of the California Code of Judicial Ethics provides, in pertinent part, "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . ."

[2] Canon 2 of the California Code of Judicial Ethics states, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."

to wear the stealth belt. The court told counsel that it discussed the matter with defendant during their ex parte conversation, as described in the preceding section of this opinion.

After defendant returned to the courtroom, he objected to the court's insistence that he either wear the stealth belt or be tried with additional security personnel in the courtroom. Defendant noted "there have been no incidents" and argued that the nature of the charges and defendant's size were legally insufficient to justify additional security. The trial court stated it would order additional security personnel, but defendant would have to continue to wear the stealth belt until they arrived in the courtroom. At the end of the day, after further trial proceedings including testimony by Cudjo, defendant informed the court that he was "willing to accept the stealth belt but it's only because his only other option is additional security. And at this point we feel that that would be, of course, prejudicial to him." The court noted that there were two sheriff's deputies in the courtroom at that moment and there had been a third "when the jury was brought in."

Defendant contends that the trial court abused its discretion and violated his right to due process when it "ordered that [defendant] be physically restrained with the stealth belt during trial and in the presence of the jury." While recognizing that he chose to wear the stealth belt to prevent the court from having additional security personnel in the courtroom, defendant argues that the trial court's conduct in forcing him to choose between the belt and additional security personnel created the same due process concerns as if the court had forced him to wear the belt. The Attorney General argues that because the court had authority to ask for additional security officers, defendant cannot complain that the court accommodated his request to wear the stealth belt instead.

A defendant may not be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints, such as unruliness, a likelihood of escape or courtroom violence, or evidence of any prior or planned nonconforming conduct. (*People v. Cox* (1991) 53 Cal.3d 618, 651, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) The trial court must base its determination on facts, not rumor. (*Cox*,

at p. 652.) We review that determination for abuse of discretion. (*People v. Hill* (1998) 17 Cal.4th 800, 841.)

The presence of multiple security officers in the courtroom does not present the same concerns. "A trial court has broad power to maintain courtroom security and orderly proceedings." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1269 (*Hayes*).) "[T]he use of security personnel, even in the courtroom, is not so inherently prejudicial that it must be justified by a state interest specific to the trial." (*Id*. at p. 1268.) This is because security measures, unlike physical restraints or jail attire, are not an unmistakable indication of a "'need to separate a defendant from the community at large.'" (*Ibid*.) Security personnel and security screenings are commonplace and are unlikely to "'be interpreted as a sign that [the defendant] is particularly dangerous or culpable.'" (*Ibid*.) "[S]o long as their numbers or weaponry do not suggest particular official concern or alarm" (*Holbrook v. Flynn* (1986) 475 U.S. 560, 569 [106 S.Ct. 1340] (*Holbrook*)), the presence of armed security personnel in the courtroom "need not be justified by the court or the prosecutor" (*People v. Duran* (1976) 16 Cal.3d 282, 291, fn. 8). We review the court's decisions regarding security measures in or around the courtroom for abuse of discretion. (*People v. Ayala* (2000) 23 Cal.4th 225, 253.)

Deeming the use of physical restraints to be voluntary and unchallengeable whenever a trial court presented a defendant with a choice between being restrained and having extra security personnel in the courtroom would circumvent and undermine the substantial body of state and federal law restricting the use of such restraints to situations in which they are manifestly needed. But we need not determine whether the trial court here effectively insulated its use of the stealth belt from review by forcing defendant to choose between the belt and the presence of four extra sheriff's deputies.

If, as defendant argues, the use of the stealth belt constituted an abuse of the trial court's discretion, the error was harmless. "[W]e have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or

participate in his defense." (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) Nothing in the record indicates that the jury saw the stealth belt or that the belt impaired or prejudiced defendant's participation in his defense or influenced his decision not to testify. Defendant's argument on appeal that "the jurors saw [defendant] shackled to the chair" is mere speculation and contradicts his admission in his opening brief that "[t]he record is devoid of any indication as to whether the restraints were visible to the jury or not." Defendant's argument that his "failure to stand up when the jury entered may have factored into the thought process with some jurors" is expressly and necessarily based upon speculation. As soon as defendant brought that concern to the trial court's attention, the court eliminated the potential for prejudice by prohibiting counsel from standing when the jury entered. Defendant is also incorrect in asserting that error is reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824]. The *Chapman* standard applies only where the restraints were visible to the jury for a substantial length of time. (*Deck v. Missouri* (2005) 544 U.S. 622, 635 [125 S.Ct. 2007]; *People v. Jackson* (1993) 14 Cal.App.4th 1818, 1830.) Because there is no evidence that any juror saw the stealth belt or that it interfered with defendant's right to testify or participate in his defense, the use of the restraint was at most harmless error.

Examining, in the alternative, the court's choice to summon additional sheriff's deputies, we find the record insufficient to demonstrate an abuse of discretion. The record indicates that on a single afternoon during the trial, two extra sheriff's deputies entered the courtroom. One of the them apparently left at some unknown point before the court recessed for the day. The record does not indicate where the extra deputies sat or stood or whether they were armed. Defendant has not shown that, under the circumstances, the two extra deputies' presence would be interpreted as a sign that he was particularly dangerous or culpable. He also has not shown actual prejudice from this brief presence of two extra deputy sheriffs on one afternoon. We cannot say that a total of three deputies in the courtroom for a brief time was an unreasonable number or that "'the scene presented to jurors . . . was so inherently prejudicial as to pose an unacceptable

threat to defendant's right to a fair trial . . . .'" (*Hayes, supra*, 21 Cal.4th at p. 1269, quoting *Holbrook, supra*, 475 U.S. at p. 572.)

The petition for a writ of habeas corpus raises identical claims regarding the stealth belt and the use of additional security personnel. For the reasons stated in this section, the petition fails to state a prima facie claim upon which relief could be granted.

3. Correction of abstract of judgment

The abstract of judgment incorrectly cites the authority for the stayed enhancements for count 2 as sections "1022.5" and "1022.7." If the trial court has not already done so, it must issue an amended abstract of judgment reflecting the proper authorities: sections 12022.5 and 12022.7.

DISPOSITION

The judgment is affirmed. The petition for a writ of habeas corpus is denied. The trial court is directed to issue an amended abstract of judgment reflecting that the authorities for the stayed enhancements for count 2 were Penal Code section 12022.5, not 1022.5, and Penal Code section 12022.7, not 1022.7. We direct the clerk of this court to send a copy of this opinion to the presiding judge of the Los Angeles Superior Court.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.